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The Informal Politics of Codecision: Introducing a New Data Set on Early Agreements in the European Union

Edoardo Bressanelli, Adrienne Héritier, Christel Koop and
Christine Reh

European University Institute
Robert Schuman Centre for Advanced Studies
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EUI Working Paper **RSCAS** 2014/64

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Abstract

One of the most important developments in the history of the EU's codecision procedure has been the steep rise in "early agreements" since 1999, and the shift of legislative decision-making from public inclusive to informal secluded arenas. As part of a wider research project on "The Informal Politics of Codecision", this working paper launches a new data set on all 797 legislative files concluded under codecision between 1999 and 2009. The paper discusses the process of data collection and coding; explains and justifies the operationalisation and measurement of key variables; and elaborates on the methodological challenges of capturing informal political processes. The paper offers rich descriptive statistics on the scale and scope of early agreements across time, and explores how key characteristics of the legislative file (legal nature, policy area, complexity, salience, policy type, duration) and of the main negotiators (priorities of the Council Presidency, ideological distance between Parliament's rapporteur and national minister, Presidency's workload) co-vary with decision-makers' choice to "go informal". Demonstrating that early agreements are not restricted to technical, urgent or uncontested files but occur across the breadth of EU legislation, and increasingly so with time in use, the data strongly underline the relevance of informal decision-making for scholars and policy-makers alike.

Keywords

Codecision, early agreements, trilogues, informalisation, 1999-2009, file characteristics, negotiators' properties

1. Introduction

This working paper introduces a new data set on all 797 legislative files concluded under the European Union (EU)’s codecision procedure between 1999 and 2009. The data set results from a research project on “The Informal Politics of Codecision” which investigates why, how and with what consequences legislative decision-making in the EU is increasingly shifted from public inclusive to informal secluded arenas.¹

Codecision—the legislative procedure that requires the Council of the European Union (Council) and the European Parliament (EP) to agree so that an act can become law—was established in 1993; the possibility for the co-legislators to conclude the procedure “early” at first reading was introduced in 1999.² One of the most important changes in the history of codecision, this possibility—and its routine use by the co-legislators—has fundamentally transformed the practice of EU decision-making. To conclude a file at first reading, the Council must adopt the European Commission’s legislative proposal, as amended by Parliament, in its own first reading of the act; to conclude a file at early second reading, the Parliament must adopt the Council’s common position without amendments. Analytically, our project focuses on those cases of early conclusion where the Council and Parliament disagree initially about the legislative outcome, and where the early adoption of legislation, therefore, requires the negotiation of an informal compromise before the first or early second reading of a file. Early agreements (EAs), thus defined, have two repercussions: 1) *de facto* decision-making is systematically shifted into an informal, secluded arena; 2) the procedure is abridged and legislation is “fast-tracked” accordingly.³

Investigating the informalisation and seclusion of EU legislation matters for several reasons. First, early conclusion has become ubiquitous: since 1999, conclusion at first reading has increased dramatically from 28% in the Fifth EP to 81% in the current legislature (see Table 2). Even under our more restricted definition, EAs account for almost 40% of the legislation adopted between 1999 and 2009, with an upward trend (see Figures 1-3). Second, this increase—and the resulting transformation of codecision—is politically salient and normatively contested. Inside Parliament, criticism has been voiced since the early 2000s (Imbeni et al. 2001), and the 2009 and 2012 reforms of the EP’s Rules of Procedure saw high degrees of conflict over both the desirability and regulation of early conclusion (European Parliament 2011; 2012a). Similarly, praise for the efficiency of EAs notwithstanding (Jacqué 2008), scholars, practitioners and national parliaments have criticised their lack of inclusiveness, transparency and open deliberation (Bunyan 2007; House of Lords 2009; Huber and Shackleton 2013; Lord 2013; Shackleton and Raunio 2003; Stie 2013). Finally, given the wider trend towards informalisation and seclusion in both domestic and global governance (Bedock et al. 2012; Daase 2009), codecision in the Fifth and Sixth EP can serve as an ideal test case for the growing number of scholars with an interest in informal governance (Christiansen and Neuhold 2012). In short, the informalisation of codecision is empirically ubiquitous, politically contested, normatively challenging and potentially of wider relevance for the study of informal governance and institutions.

Building on the work by Farrell and Héritier (2003, 2004, 2007), our project has, so far, assessed the conditions under which decision-makers “go informal” (Reh et al. 2013); analysed intra-

¹ The authors gratefully acknowledge the funding received from the Research Council of the European University Institute (EUI) and from the UK’s Economic and Social Research Council (ESRC; Grant RES-000-22-3661). They also thank Nicola Chelotti and Lukas Obholzer for their research assistance.

² Post-Lisbon, the procedure is officially called the “ordinary legislative procedure” (OLP; Art. 294 TFEU). However, given that codecision has never been the procedure’s official name, and given that the term continues to be used by academics and practitioners, we will use the term codecision in this working paper.

³ However, not all early agreements are “fast”: as Toshkov and Rasmussen (2012) have shown, the negotiation of highly salient files agreed at first reading takes longer than the negotiation of files agreed at second reading.

parliamentary reform in response to the steep increase of EAs (Héritier and Reh 2012; Obholzer and Reh 2012); explored the consequences of early conclusion for actors' bargaining success (Rasmussen and Reh 2013); and evaluated the democratic repercussions of routine delegation into the informal arena (Reh forthcoming). As a key part of our research, we built an original data set of all 797 codecision files concluded in the Fifth and Sixth EP. The data allowed us to gauge the scale, frequency and characteristics of EAs, and to systematically test theoretical hypotheses about the likelihood and consequences of informal politics. This working paper introduces the data set; discusses the process of data collection and coding; elaborates on the methodological challenges encountered in any attempt at capturing negotiations which pre-dominantly play out in an informal and, hence, inaccessible arena; and explains and justifies the operationalisation and measurement of the variables (see Reh et al. 2013 for the theoretical arguments behind the selection of the variables). We also include rich descriptive statistics, demonstrating the scale and frequency of EAs across time and policy-areas, illuminating the characteristics of the legislative files concluded early, and illustrating the properties of the actors involved in their negotiation.

The working paper accompanies the publication of our data set on the European Union Democracy Observatory (EUDO) website (<http://www.eui.eu/Projects/EUDO-Institutions/DatasetonTheInformalPoliticsOfCodecision.aspx>). We hope that the data will inform future research on legislative politics and informalisation, in the EU and beyond.

2. Early Agreement as Informal and Secluded Decision-Making

Understanding informal decision-making has become imperative for anyone interested in the process and outcome of the EU's codecision procedure. Codecision was established with the Treaty of Maastricht in 1993, and requires agreement by both the Council and the Parliament for the adoption of legislation. Reaching such agreement can take up to three readings, including conciliation at the final stage. In 1999, the Treaty of Amsterdam reformed the procedure in two decisive ways: first, instead of requiring a minimum of two readings, the Treaty allowed the co-legislators to conclude the procedure at first reading already; second, where conciliation failed, the Treaty removed the Council's right to re-introduce its common position at third reading.

Since its introduction in 1999, early conclusion has surged (see Table 2). This surge and the concomitant transformation of the legislative process have refuted both the concerns voiced and the expectations raised when codecision was introduced. Contrary to concerns about procedural complexity and potential gridlock (Scharpf 1994), codecision has proved to be highly efficient: more than 1200 legislative acts were adopted between 1993 and 2011 (European Parliament 1999, p. 4, 2012b, p. 4); the average duration of the codecision procedure has decreased (European Parliament 2012b, p. 6); and the EU has responded swiftly to urgent policy-challenges. Yet, contrary to hopes for more open and inclusive supranational law-making, the routine use of EAs has insulated *de facto* decision-making from the electorate and rank-and-file parliamentarians (Lord 2013).

Informalisation and seclusion are consequences of the way EAs are reached: the conclusion of codecision at first or early second reading hinges upon the mere formalisation—or “rubberstamping”—of a pre-agreed compromise, and where Parliament and Council do not agree *a priori* on the desired legislative outcome, this compromise must be negotiated in “trilogues”, bringing together representatives from the Council, Commission and Parliament in an informal negotiation setting before the first or early second reading of a legislative file.

To conclude codecision at first reading, the institutions enter into trilogue negotiations after the Commission has tabled its legislative proposal. These negotiations take place *before* the EP has issued its formal opinion and *before* the Council has adopted its common position. If the co-legislators can agree informally, the EP incorporates, and accepts, the negotiated compromise in its own first reading amendments; it requires a simple majority to do so. Subsequently, the Council accepts the

Commission proposal as amended by Parliament, with the procedure closed and the act adopted accordingly. An early second reading agreement is possible when the EP, at its second reading, accepts—rather than amends—the Council’s common position. In this case, it is the Council that incorporates the informal agreement in its own position, which is subsequently adopted by simple majority in Parliament—rather than by the absolute majority required to amend legislation at second reading (Hagemann and Høyland 2010). At this stage, the informal compromise must be reached *after* the EP’s first reading and *before* the Council has adopted its common position.

As the above shows, trilogues are played out as part of the EU’s formal institutional framework: if decision-makers choose to use the possibility of early conclusion as offered in the Treaty, they need to draw on alternative negotiation spaces.⁴ As such alternative spaces, trilogues complement formal decision-making, but they differ from the formal arena in four ways (Reh et al. 2013, pp. 1115-1117; pp. 1119-1120). First, in contrast to parliamentary committees, plenaries and Council meetings, membership in trilogues is restricted and non-codified; second, trilogues are secluded and non-transparent, as access to decision-making and documentation is limited; third, interaction in trilogues is structured by informal rules which are “created, communicated and enforced outside officially sanctioned channels” (Helmke and Levitsky 2004, p. 727I); and, fourth, any substantive agreement reached in trilogue is intermediate until formalised by the EP’s plenary and the Council.

In sum, under conditions of legislative conflict between Council and Parliament, the early conclusion of codecision requires the pre-negotiation of compromise in trilogues. It is the restricted, secluded and informal nature of these trilogues that creates novel institutional opportunities and constraints; that has triggered growing normative criticism; and that makes legislation in the Fifth and Sixth EP an ideal test case for scholars with a wider interest in the causes and consequences of informalisation and seclusion.

The transformation of the institutional context and legislative practice of codecision also impacts on the study of EU legislative politics, shifting our theoretical and empirical focus from the formal rules of codecision in the conciliation “endgame”, to the reasons for, and the consequences of, informalisation at the early stages of the procedure.

Research conducted so far has distilled several explanations for both early conclusion and early agreement. In her study of the Fifth EP, Rasmussen (2011) shows that first reading conclusion is more likely when the co-legislators are familiar with each other, with bargaining uncertainty accordingly reduced, and less likely when a rapporteur deviates from the median legislator in big political groups. Our own analysis of EAs from 1999-2009 demonstrates that the choice to “go informal” is systematically related to the number of participants, legislative workload, complexity, and—supporting Rasmussen—to the time EAs have been in use (Reh et al. 2013). While these findings provide important clues about the likelihood of EAs across types of legislation and institutional context, they leave us with the challenge of explaining why several of the key theoretical variables tested—issue salience, redistribution, priorities of the Council Presidency—do not have the expected effect, and of establishing the causal mechanism behind the strong effect of our variable “time in use”.

The increase in EAs poses particular challenges to the extensive scholarly debate about whether and how the formal rules of legislation affect the legislative influence of, and the distribution of power between, the EU’s co-legislators. Theoretically, EAs shift our focus from the formal rules at the third and final stage of codecision (Tsebelis 1994; Tsebelis and Garrett 1997, 2000), to the informal institutions at the early stages, and to the novel opportunities and constraints they create (Farrell and Héritier 2004). Methodologically, the specific mechanism through which EAs are reached—as explained above, the “rubberstamping requirement” implies that the Parliament and Council need to incorporate the inter-institutional compromise in their own respective opinions and positions—challenges the validity of amendment success as the most established indicator of the EP’s influence

⁴ See Helmke and Levitsky (2004, p. 727II) for possible relationships between formal and informal institutions.

across legislative procedures (Kreppel 1999, 2002; Kasack 2004). Empirically, few studies have, so far, tackled this challenge, either by systematically linking the analysis of informal procedures to the EP's legislative influence via amendments (Häge and Kaeding 2007; Kardasheva forthcoming), or by explaining the consequences of early conclusion on actors' intra-institutional bargaining success (Rasmussen and Reh 2013).

Turning to the democratic evaluation of codecision, EAs have re-directed our attention from the EP's formal empowerment (Hix and Høyland 2013; Rittberger 2005) to the application of the Treaty rules in the legislative process. Scholars and practitioners have, primarily, focused on the seclusion of trilogues and on its consequences—for the transparency of EU legislation (Bunyan 2007; European Parliament 2012; Huber and Shackleton 2013; Imbeni et al. 2001; Shackleton and Raunio 2003; Stie 2013); for the access opportunities of wider societal and political interests (Imbeni et al. 2001); for political contestation and open deliberation (Lord 2013; Stie 2013); for public control through mutual checks and balances where Parliament and Council collude (Lord 2013); and for the possibility of effective parliamentary oversight at the national level (House of Lords 2009).

Finally, the shift of *de facto* decision-making into trilogues has implications for data accessibility. When building our data set we faced two challenges in particular: first, where a file's stage of conclusion is a necessary but insufficient indicator of early agreement, we required evidence about the negotiation of compromise between Parliament and Council, while, second, the arena in which such compromise is built—and in which the actor and file characteristics are played out—is closed and largely undocumented. The following two sections will discuss how we tackled these and other challenges in the construction of our data set; how we operationalised and measured relevant actor, process and file characteristics; and what our descriptive statistics tell us about the scale, frequency and types of EAs concluded in the Fifth and Sixth EP.

3. Capturing Early Agreements

To be categorised as an EA in our data set, a legislative act needs to meet two conditions: 1) the procedure must be concluded at first or early second reading, and 2) the agreement must be based on an informal compromise between the co-legislators (Reh et al. 2013, p. 1117). We imposed the first condition because only those agreements reached at first or early second reading require a systematic and significant shift of decision-making from the formal and inclusive to the informal and secluded arena. We formulated the second condition because the stage of conclusion is an insufficient indicator of informalisation: agreement at first or early second reading can be a consequence of either an informally negotiated compromise or a lack of legislative conflict. Hence, only those fast-tracked acts resulting from a compromise reached in trilogue are categorised as EAs in our data set.

This definition deviates from earlier studies of fast-track legislation. Häge and Kaeding (2007) define EAs more broadly, including not only informally negotiated procedures concluded at first and early second reading, but also procedures concluded at second reading. Rasmussen (2011) focuses on the likelihood of “early conclusion”; she includes all procedures closed at first reading, regardless of whether these resulted from an informal compromise or the absence of conflict. Finally, Yordanova (2013, Ch. 5), who assesses the impact of EAs on the legislative power of EP committees, uses the term EA in a more narrow sense. She refers only to first reading agreements based on an informal compromise, and thus excludes agreements reached at early second reading.

To gain insight into the role, scope and features of EAs, our data set includes all codecision procedures concluded in the Fifth and Sixth EP. More specifically, we included those procedures that were completed between 20 July 1999 (the first day of the Fifth EP) and 17 July 2009 (the last day of the Sixth EP), based on a search of the European Parliament's Legislative Observatory (OEIL)⁵, a

⁵ <http://www.europarl.europa.eu/oeil/home/home.do> (last consulted on 29 April 2014).

database with the details of all EU legislative procedures. This search resulted in 797 procedures. Since previous studies on codecision, early conclusion and EAs focused on a single legislative term (e.g., Rasmussen 2011; Yordanova 2013) our data set is the most comprehensive collection so far.

We subsequently gathered data on those features of codecision files which were relevant for our research project, starting with the variable of main interest: EA. The following describes the operationalisation of our EA variable; section 4 then discusses the operationalisation of relevant characteristics of the legislative process, actors and files.

We used the following procedure to identify EAs. First, we collected data on the stage at which the procedure was concluded, aiming to single out all first and early second reading agreements. Based on the “key events” section in the OEIL’s procedure files, identifying procedures concluded at first reading was straightforward. Finding out which procedures were concluded at second reading was equally straightforward, but in addition we needed to know whether a second reading procedure was concluded early (i.e., the negotiated agreement between Parliament and Council was incorporated in the common position of the Council) or not (i.e., agreement was only reached after the communication of the Council’s common position to the Parliament). This information is provided in the “summary” documents, which are attached to the overview of “key events” in the procedure files in the OEIL database.

Second, as the “summary” documents do not only provide information on the stage at which an agreement was concluded, but also on the way in which this agreement was reached, we relied on these documents to find evidence of informally negotiated compromise. In doing so, we followed the procedure suggested by Yordanova (2013). For each procedure, we read all the documents to find out how agreement between the Council and the Parliament was reached, focusing particularly on formulations which pointed to negotiations as well as to agreements reached in trilogue. Particularly in the more recent period of the Sixth EP, such formulations are similar. The following formulations are often used to indicate that a compromise between the institutions was reached at first reading:

- “The amendments are the result of a compromise between Parliament and Council [...]”
- “The amendments are the result of a compromise negotiated with the Council [...]”
- “The amendments were the results of a compromise package between the Council and Parliament.”
- “In accordance with the compromise reached at first reading between the Parliament and the Council [...]”
- “Following a first reading agreement with the European Parliament, the Council adopted [...]”
- “Having reached agreement with the Parliament at first reading, the Council adopted [...]”
- “There is a consensus between the Commission, the Council and the Parliament [...]”
- “Compromise amendments were agreed between the rapporteur, the Commission and the Council Presidency.”
- “There is no need for a formal modified proposal, as there is already agreement between the European Parliament and Council, endorsed by the Commission.”
- “There is no need for an amended proposal as there is already an agreement between the institutions.”
- “Negotiations conducted with the Commission and the Council with a view to reaching an agreement ahead of the plenary vote have resulted in a compromise package supported by all the political groups.”
- “At a trilogue meeting held on [...], the European Parliament and the Council agreed that [...]”
- “The European Parliament adopted a compromise package [...]”

To indicate that a compromise was reached at early second reading, the following two formulations are typically used:

- “The common position [...] reflects the compromise text agreed by all three institutions [...]”
- “The common position is the result of intense inter-institutional negotiations [...]”

Only if we detected such formulations, or substantively similar ones, did we conclude that the agreement was based on an informal compromise between the institutions.

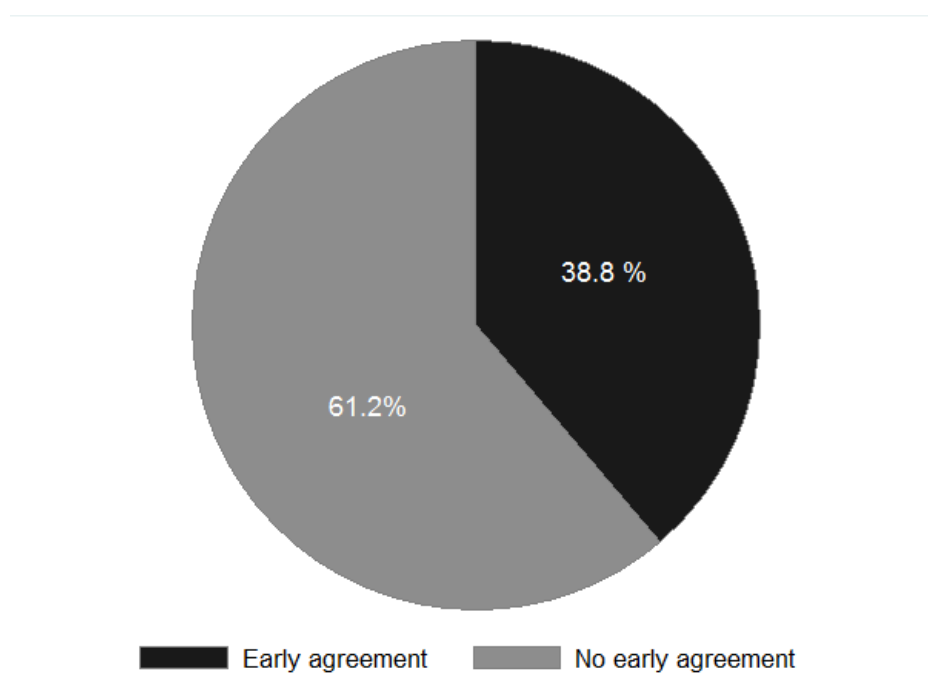
Our EA variable was then constructed by combining the data collected in steps 1 and 2: those procedures concluded at first or early second reading for which we found evidence of an informally negotiated compromise were coded as EA. They were ascribed a “1” on the variable “early agreement” in our data set, while all other procedures were ascribed a “0”.

Let us now have a look at the number and percentage of EAs. As Table 1 and Figure 1 show, a large minority of procedures—almost 40% or 309 of the 797 procedures which are included in the data set—were based on an informally negotiated compromise and were concluded at first or early second reading.

Table 1: Early Agreements: Number and Percentage

	Number	Percentage
Early agreement	309	38.8
No early agreement	488	61.2
Total	797	100.0

Figure 1: Early Agreements: Percentage



The percentage of codecision procedures which are concluded early has increased rapidly since the possibility to conclude at first reading was introduced in 1999. Table 2 shows the percentage and number of codecision procedures concluded at first, early second, second and third reading, by legislative term. The percentage of procedures concluded at first reading has increased significantly. Whilst only 28% of the procedures were concluded at first reading during the 1999-2004 legislature, 72% were concluded at first reading in the Sixth EP, and by October 2013, the percentage in the

Seventh EP had reached 81%. The percentage of second reading conclusions has decreased over time. Yet, a more dramatic decline can be observed when looking at third reading conclusions, decreasing from 22% in the Fifth EP to only 5% and 3% in the Sixth and Seventh EP, respectively.

Table 2: Codecision by Stage of Conclusion

	First reading	Early second reading	Second reading	Third reading	Total
5th EP (1999-2004)	28% (115)	50% (200)*		22% (84)	100% (399)
6th EP (2004-2009)	72% (321)	9% (42)	14% (61)	5% (23)	100% (447)
7th EP (until 22/10/13)	81% (257)	8% (26)	8% (26)	3% (8)	100% (317)

**This figure includes files concluded both at early second and at second reading.*

Sources: European Parliament (2004; 2009); EP website on Conciliations and Codecision⁶

Our new data also allow us to assess the trend towards informal and secluded decision-making by capturing the number and percentage of EAs per year. Figures 2 and 3 demonstrate a considerable increase in the use of EAs in the 2000s. The dramatic change which took place during that decade is particularly well-depicted in Figure 3: while the share of EAs was negligible in the early 2000s, informal decision-making had become the established practice by the late 2000s. The year 2006 appears to be a veritable turning point as, for the first time, the number and share of EAs was higher than the number and share of the non-informal and non-secluded “standard” procedures: in that year, the percentage of EAs increased from 21% to 53%.

The two figures also show us the developments of informal decision-making in the period after the EU’s 2004 enlargement. The literature suggests that an increase in the number of actors involved in a negotiation adds to the costs of information gathering and bargaining. Following this reasoning, the large increase in the number of EU member states in 2004 should have increased the negotiation costs under codecision (Hertz and Leuffen 2011; Rasmussen 2011, p. 52), including the costs which the co-legislators face when coordinating their positions within their respective organisations. Using informal arenas may reduce these costs—in particular, as the adoption of an EA only requires a simple majority of votes in Parliament—and may therefore be particularly attractive for actors when they are faced with an increase in the number of negotiation participants (see Reh et al. 2013, p. 1123).

⁶ http://www.europarl.europa.eu/code/about/statistics_en.htm (last consulted on 29 April 2014).

Figure 2: Number of Early Agreements over Time

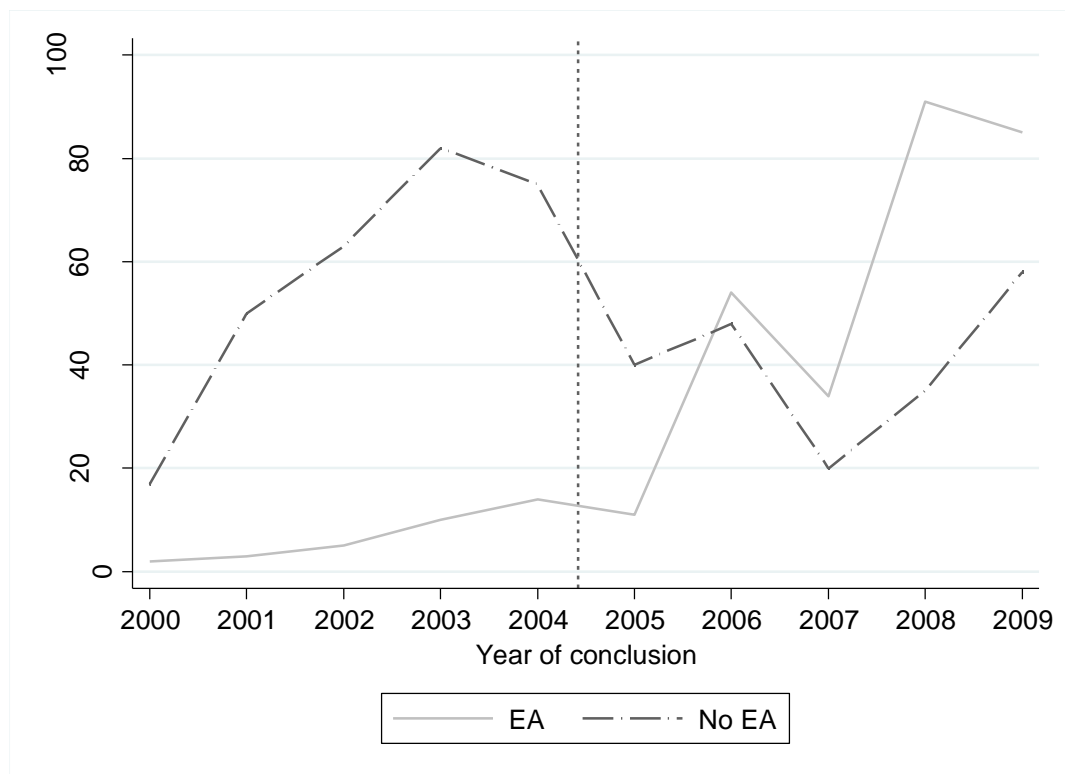
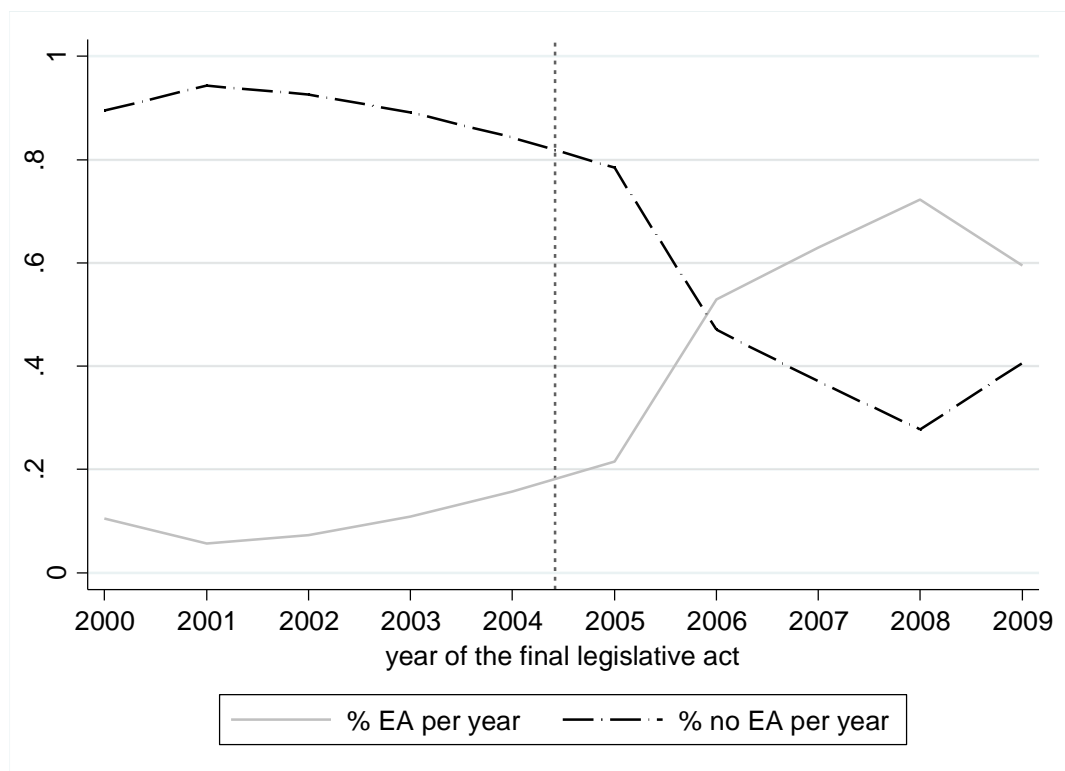


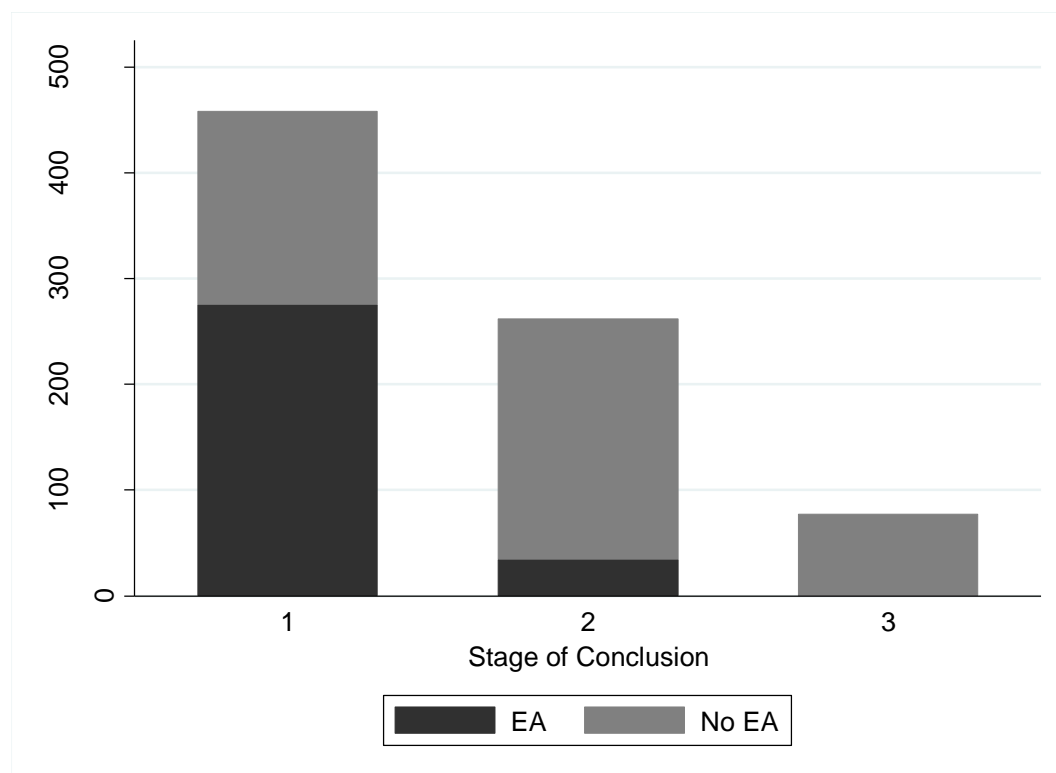
Figure 3: Percentage of Early Agreements over Time



Figures 2 and 3 give some insight into these dynamics, with the dotted line in the figures indicating enlargement. While it should be emphasised that we do not systematically test theoretical claims in this paper, the figures suggest that enlargement was, indeed, accompanied by an increased use of EAs. This trend has started a bit earlier though, which may suggest that an anticipation effect (Leuffen and Hertz 2010) was at work.

Let us, finally, have a look at the relationship between EAs and early conclusion. Figure 4 presents the number of EAs by stage of conclusion. The figure demonstrates that the variables “early agreement” and “early conclusion” capture different aspects of the legislative process. Even though a vast majority of the procedures concluded at first reading are EAs, there are still a considerable number of first reading files which do not result from informal negotiation in trilogue. Furthermore, EAs can also be found at second reading.

Figure 4: Early Agreements versus Early Conclusions



In sum, our data distinguish between early conclusion and early agreement under codecision, but demonstrate a steady increase in both since 1999. First reading conclusion saw a particularly steep rise in 2006; the EU’s “big bang” enlargement in 2004 was both preceded and accompanied by an increase in the use of early agreement; and EAs constitute the majority—but by no means all—of the codecision files concluded at first reading.

4. Variation in the Use of Early Agreements

This section explores the variation in the use of EAs to shed some light on decision-makers’ choice to “go informal”. In what follows, we therefore present the co-variation between the (independent) variables included in our data set and the use of EAs (for a systematic test of alternative theoretical explanations, see Reh et al. 2013). We will focus more specifically on key characteristics of the legislative dossier (its legal nature, policy area, complexity, salience, policy type and duration) and of the main actors negotiating the agreement: the EP’s rapporteur and the Council Presidency (the

priorities of the Council Presidency, the ideological distance between rapporteur and national minister, the Presidency's workload).

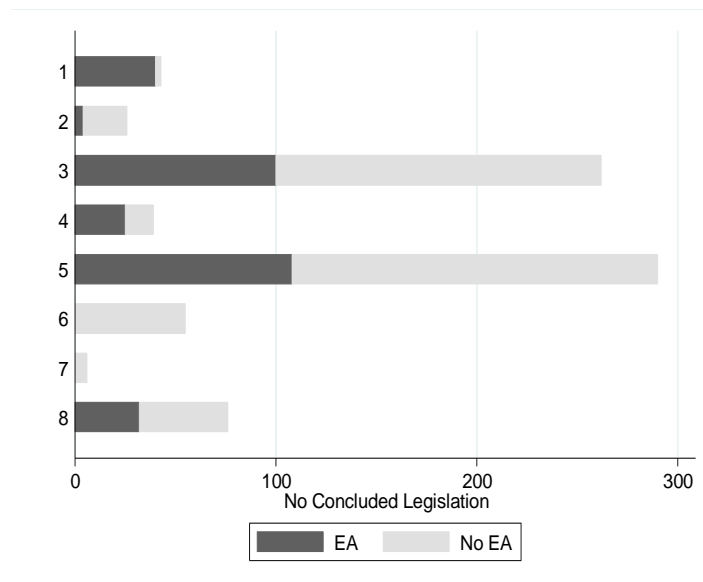
4.1 Characteristics of Legislation

Legal nature

First, we observe variation depending on the legal nature of the legislative file. As Figure 5 shows, the majority of all codecision procedures concluded between 1999 and 2009 fall under the categories “new legislation” and “amendment of content”. In both cases, EAs constitute about 40% of the total files concluded. Yet, as we pointed out in the previous section, the number of EAs is steadily increasing.

Interestingly, EAs represent the quasi-totality of “adapted” procedures, whereas they are absent from “codifications” and “repeals”. Yet, there is a straightforward explanation for these figures. The “adapted” procedures are adaptations to the new regulatory procedure with scrutiny and/or to the implementing powers conferred on the European Commission following the adoption of the Council Decision 2006/512/EC of 17 July 2006. From that moment onwards, the new Comitology system required the adaptation of several legislative procedures, and it did so in a period during which informalisation had already become the norm in EU decision-making. By contrast, procedures characterised as “codification” and “repeal” are never concluded as EAs. Codification is a technical procedure, bringing a former legislative act and all its amendments together in a new act. As set out in the Inter-institutional Agreement of December 1994, it is key that “no substantive changes to these [former] acts” are made. Therefore, the legal services of the EU institutions draft the new document with no need for the Council and the Parliament to negotiate.

Figure 5: Legal Nature of Legislation and Early Agreements



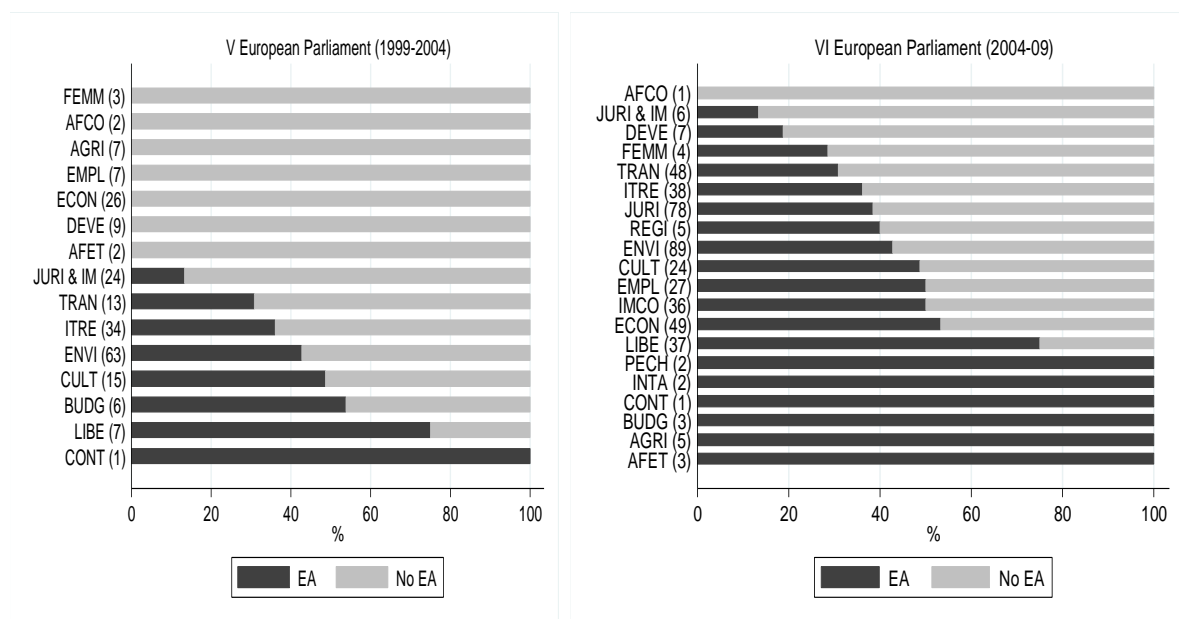
Key: (1) adaptation, (2) extension in time, (3) amendment of content, (4) recast, (5) new legislation, (6) codification, (7) repeal, (8) new legislation also repealing old legislation.

Policy area

EAs also vary across policy areas. As Figures 6 and 7 display, we find considerable variation when we compare EP committees and Council configurations, respectively. Focusing on EP committees first, two main points can be raised. Moving from the Fifth EP (1999-2004) to the Sixth (2004-2009), the number of committees participating in informal negotiations has steadily increased. Second, some committees have negotiated all their legislation informally: this is the case for Budgetary Control (CONT), in both legislative terms here considered, and the Fishery (PECH) and International Trade (INTA) committees, in the Sixth EP. The latter two only became “codecision committees” after the Lisbon Treaty entered into force, and the number of procedures they dealt with until 2009 was therefore limited.

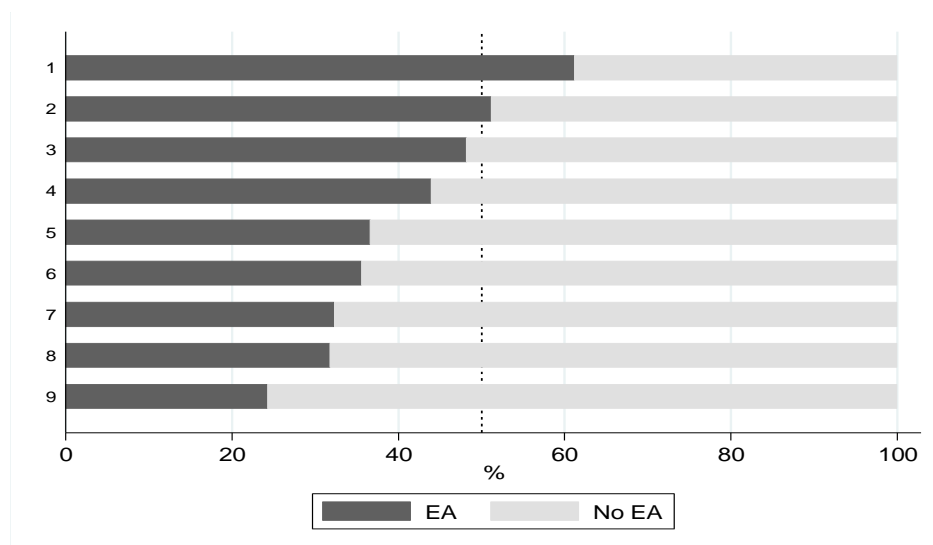
Among the committees which scrutinise a larger number of procedures, the committee on Civil Liberties, Justice and Home Affairs (LIBE) was particularly keen to “go informal” in the fifth legislature already, whereas the Committee on Economic and Monetary Affairs (ECON) started to make use of EAs in the Sixth EP. By contrast, the Legal Affairs (JURI), the Industry, Research and Energy (ITRE) and the Transport and Tourism (TRAN) committees only conclude only about a third of legislation as EAs.

Figure 6: Committees and Early Agreements in the Fifth and Sixth EP



Note: in brackets, the number of legislative files negotiated by the committees

Figure 7: Council Configurations and Early Agreements



Key: (1) Justice and Home Affairs, (2) Agriculture and Fisheries, (3) General Affairs and External Relations, (4) Education, Youth and Culture, (5) Competitiveness, (6) Employment, Social Policy, Health and Consumer Affairs, (7) Economic and Financial Affairs, (8) Environment, (9) Transport, Telecommunications and Energy.

Different Council formations show some degree of variation in the use of EAs, though not as pronounced as EP committees (Figure 7). It should be noted that the names and competences of the Council configurations have changed over time, mainly as a result of the Seville European Council in 2002 and the Treaty of Lisbon in 2009. Our categories represent, to a large extent, the Council configuration in place between 2002 and 2009. We coded for the Council which concluded the negotiations, or which reached a “political agreement”. In line with what we observed for the EP committees, EAs are more frequent in the area of Justice and Home Affairs (more than 60%) and Agriculture and Fisheries (more than a half), while the Transport, Telecommunications and Energy Council makes less use of EAs. Hence, although the debate about EAs is largely focused on the Parliament, or on its organisational units and actors, the different Council configurations also seem to have their own organisational cultures, with some being more prone to “going informal” than others.

Complexity

Variation in the use of EAs may also be a function of the dossier’s complexity. Indeed, when negotiation requires considerable effort and time, and when transaction costs consequently rise, the informal arena may represent a convenient way to take decisions more speedily (see Reh et al. 2013, pp. 1123-1124). In order to capture the complexity of a legislative file, we relied on two different indicators: first, the number of recitals in the Commission’s legislative draft, and, second, the number of EP committees which were asked to provide their opinion on the draft legislation.

Indicating high transaction costs of information gathering, both the number of recitals and the number of committees capture the policy/technical complexity of a legislative dossier. Yet, the use of the number of committees as a proxy for complexity is not uncontroversial. For instance, both Rasmussen (2011, p. 53) and Best and Settembri (2008, p. 185) used this measure as an indicator of salience: when a legislative file cuts across several issue areas, they argue, it is more likely to attract considerable attention. However, based on the opposite argument—i.e., the more technically complex the legislation, the less attention it is likely to attract from non-specialists—we opted for a different operationalisation of salience (see below), and employed the number of committees as an indicator of complexity.

Moving beyond issues of operationalisation, Table 3 shows the average scores for EAs and non-EAs on our two proxy measures of complexity—the number of recitals, and the number of committees. The table also includes the p-values, which allow us to assess whether the difference between the scores of the two categories (EAs and non-EAs) on the variables is statistically significant—i.e., whether the difference cannot be explained by chance alone. Differences are normally regarded as statistically significant when the p-value is 0.05 or lower, where 0.05 indicates that there is a 5% probability that the differences have occurred by chance. Looking at the averages and p-values in Table 3, we can see that there is a strong association between EAs and complexity. Commission proposals which lead to conclusion by EA include both a higher number of recitals (on average, two additional recitals) and a higher number of committees giving their opinion.

Table 3: Complexity and Early Agreements

	No early agreement	Early agreement	P-value
Recitals	15.3	17.3	0.03
Committee Opinion	0.5	1.6	0.00

Salience

The use of EAs may further be affected by the nature of the legislative file under negotiation and, more specifically, by its relevance for EU citizens. That is, when a codecision file is “salient” in the eyes of the public, or when it has “redistributive” implications, informal closed-door negotiations may be less likely, because under such conditions the recourse to the informal arena can be regarded as less justified from a democratic and political point of view (see Reh et al. 2013, p. 1124). To capture such “salience”, we looked at the coverage of the legislative dossiers by important European newspapers. More specifically, we measured salience as the average number of times a directive or regulation was mentioned in some key newspapers in the four largest EU member states (France, Germany, Italy and the UK).⁷ By selecting newspapers with a different ideological outlook, and in the EU’s four largest countries, we aimed to make our measure less biased towards the views of a given target, which is a criticism frequently raised against salience measures based on the content analysis of media (see Warntjen 2012, p. 172).

We used Lexis-Nexis Academic to search inside the selected newspapers. In order to guarantee inter-coder consistency, we always searched for the specific keywords included in the title of the legislative proposal and in the most common label (if available) used to identify it. For instance, in the case of “Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market”, we searched for “Services Directive” and “Bolkenstein Directive”, while “Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time” became the “Working Time Directive”.

Salience is, in itself, a very interesting variable: our analysis reveals that most EU legislation receives little or no attention by the media. That is, 62% of our legislative dossiers are not mentioned by any newspaper, in any member country. Only in 10% of the cases, the average number of citations

⁷ We selected the following English, French, German and Italian language newspapers based on theoretical and pragmatic considerations (essentially, their relevance and availability). For the United Kingdom: *Daily Mail*, *Guardian*, *Independent*, *The Observer*, *The Sun*, *The Times*; for Ireland: *The Irish Times*; France: *L'Express*, *Le Figaro*, *Le Monde*, *Le Monde.fr*, *Liberation*, *L'Indépendent*; for Belgium: *L'Echo*; Germany: *Frankfurter Rundschau*, *Financial Times Deutschland*, *Der Tagesspiegel*, *Die Tageszeitung*, *Die Welt*; for Austria: *Der Standard*, *Die Presse*; and for Italy: *Corriere*, *La Stampa*, *La Nazione*, *Il Resto del Carlino*, *Il Giornale*.

is equal or larger than 1.5. A handful of codecision dossiers can be labelled as salient. Examples are the Services Directive—by far the most-often discussed piece of legislation, with an average of 464.5 references—the Working Time, the Roaming and the REACH Directives, as well as the Climate and Energy Package.⁸ Yet, as Table 4 demonstrates, even highly salient files are negotiated informally, as the Services Directive illustrates. The average salience score for files concluded as EAs is 2.6, while it is 0.9 for the remaining files. A difference-of-means test, conducted to assess the importance of salience more rigorously, demonstrates that its effect is, indeed, not significant, with the p-value of 0.3 being much higher than the 0.05 which is normally used to distinguish non-significant from significant differences.

Table 4: Salience and Early Agreements

	No early agreement	Early agreement	P-value
Salience	0.9	2.6	0.3

Policy type

We also expected EAs to be less likely for legislative acts with “redistributive implications” (see Reh et al. 2013, p. 1124). Our coding of the policy content of legislation is based on the fourfold typology introduced by Lowi (1964, 1972). According to Lowi, redistributive policies divide “have and have nots, bigness and smallness, bourgeois and proletariat” (1964, p. 691). Classic examples include income tax and welfare state policies. Distributive policies, on the other hand, are “policies in which the indulged and the deprived, the loser and the recipient, need never come into direct confrontation” (p. 690). Examples here are research grants or generalised tax reductions. The remaining categories are regulatory policies, which refer to the introduction and execution of legal regulations which impose constraints on agents’ behaviour, and constituent policies, referring to procedural policies setting the rules for the policy-making process (that is, reapportionment, setting-up an agency, etc.). As many procedures combine an element of regulation with an element of redistribution or distribution, we expanded Lowi’s typology by subdividing regulatory policies into (a) regulatory-distributive policies, (b) regulatory-redistributive policies, and (c) regulatory-technical (or pure regulatory) policies.

Operationally, legislative files are classified as “redistributive” if specific funds are mentioned, which are allocated to particular groups. By contrast, if funds are either available to every kind of group, or invested in the EU bureaucracy, or allocated to third countries, the procedure is coded as “distributive”. If no funds are mentioned, but the procedure introduces legal requirements which burden everyone, or if they burden all member states to the same extent, the procedure is coded as “regulatory-distributive”. By contrast, if the legal requirements burden a particular group or member state, we classified the procedure as “regulatory-redistributive”. “Regulatory-technical” procedures are regulations which coordinate or harmonise procedures, procedures which require actors to provide certain information, procedures which introduce guidelines and codes of conduct, and procedures which list recommendations aimed at specific sectors. Finally, if a legislative dossier has a procedural content (adaptation to Comitology, the creation of a new agency, or the appointment of a new director), it is coded as “constituent”.

⁸ The Climate and Energy Package is a set of binding legislation: within the package, the “renewable energy directive” and the three directives to reduce greenhouse effects are highly salient

Figure 8: Early Agreements and Policy Type

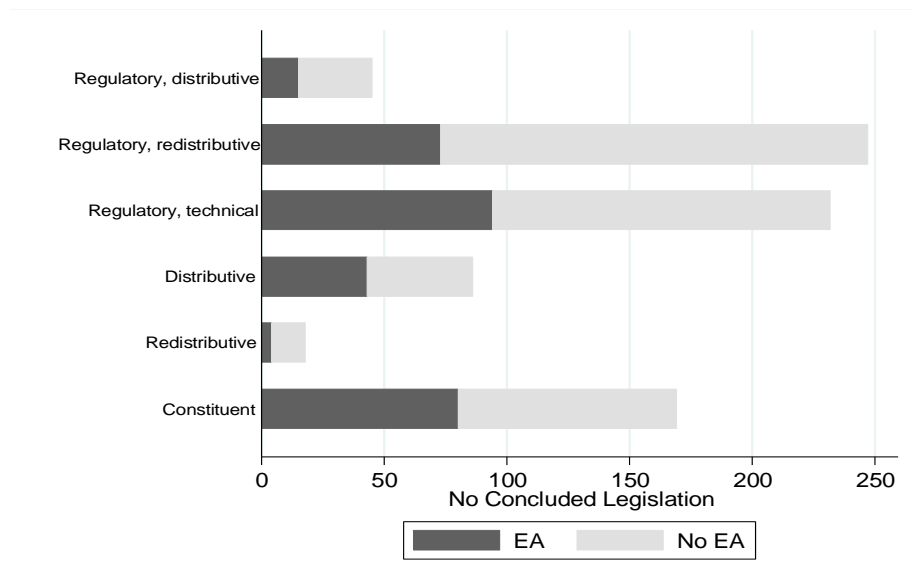


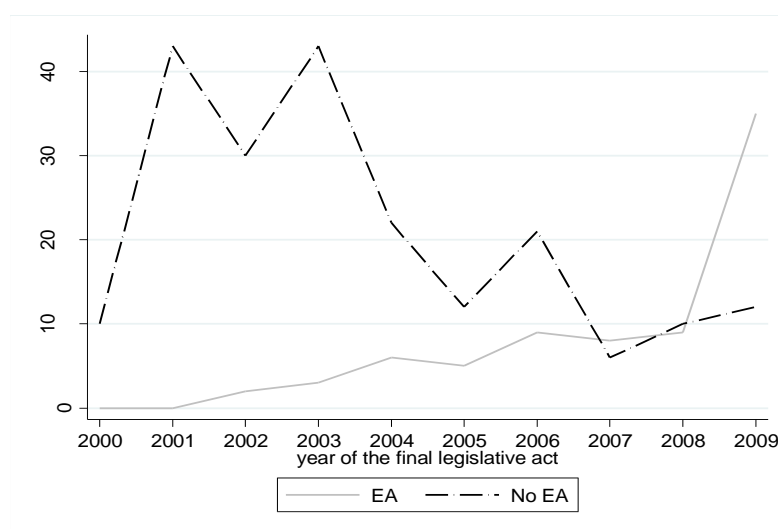
Figure 8 provides an overview of policy types. The most frequent policy type is the regulatory-redistributive one, followed by the regulatory-technical one. About 30% of all regulatory-redistributive files are concluded as EAs, while about 40% of the regulatory-technical files are concluded this way. Only few procedures are purely redistributive, and most of these are concluded as EAs. In Table 5, all procedures with redistributive implication—purely redistributive and regulatory-redistributive—are grouped together. Here, we can observe that about 40% of the procedures which include an element of redistribution are negotiated informally. Even more interesting is the observation that redistributive procedures do not escape the more general trend: as Figure 9 demonstrates, over time, they are increasingly likely to be negotiated informally.

Table 5: Redistribution and Early Agreements

	No early agreement		Early agreement	
	Freq.	%	Freq.	%
Non Redistribution	336	61.4	211	38.6
Redistribution	152	60.8	98	39.2

Note: Redistribution includes redistributive and regulatory-redistributive files

Figure 9: Redistribution and Early Agreements over Time



Duration

Finally, we explored whether there is a significant difference between the time it takes to conclude an EA and a “standard” codecision procedure. We operationalised “duration” as the length of a legislative procedure (in months), from the date on which the initial proposal was introduced by the European Commission to the date on which the final legislative act was signed. As Table 6 shows, EAs seem to save actors some time. For procedures concluded at first reading, the average duration is about 15 months for both early and non-early agreements. Yet, for procedures concluded at second reading, agreeing early saves about two months. Finally, and most significantly, third reading agreements, with an average duration of about three years, have become a rarity.

Table 6: Duration and Early Agreements

	EA	No EA
First reading	15.3	15.7
Second reading	23.8	25.9
Third reading		35.2
All procedures	16.2	23.5

Note: Duration is calculated in months

4.2 Characteristics of the Negotiators

Priority of the Council Presidency

In our study, we also focused on the legislative priorities of the Council Presidency. Previous research by Tallberg (2003) has shown that the Presidency is an actor with agenda-setting powers and the ability to influence legislative outcomes. Countries holding the rotating Presidency can therefore be expected to use their six months at the EU’s helm to push through their “favourite” legislative dossiers,

and informal negotiations with Parliament provide them with an arena to do so (see Reh et al. 2013, pp. 1124-1125).

To operationalise this variable, we relied on the programmes issued by each Presidency before the start of their term in office. We used both the programmes of each individual Presidency and, since 2007, the common work programmes of the “Trio Presidencies”—that is, the eighteen-months programmes drafted by the three consecutive presidencies cooperating during their terms. We coded a dossier as a “Presidency priority” when it was explicitly mentioned either in the programme of the Council Presidency that concluded the legislative file, or in the programme of the preceding Presidency.

Table 7 gives a first indication of the (lack of) strategic use of EAs by the rotating Presidency. Among those codecision dossiers mentioned in the programmes, only 113 (37%) were concluded as EAs. The proportion of files negotiated informally is actually slightly higher among those not listed as priorities (40%). Hence, interestingly, it appears that the Council Presidency does not use the informal arena to pursue its own legislative agenda.

Table 7: Early Agreements and Priority of the Council Presidency

	No early agreement		Early agreement	
	Freq.	%	Freq.	%
Priority	193	63.1	113	36.9
No priority	293	59.9	196	40.1

Ideological distance

Furthermore, we included a variable which captures the ideological distance between the two key negotiators: the EP’s rapporteur and the Council Presidency. The rationale behind the inclusion of this variable is that partisan connections matter: if the two chief negotiators share the same party ideology, it may be easier to reach an agreement (see Rasmussen 2011, p. 51; Reh et al. 2013, pp. 1128-1130). There is some debate on who should be regarded as the chief negotiator for the Council: both the head of government of the Presidency country and the minister in charge of the specific issue-area are likely to have leverage. We concluded that the ideological background of the sectorial minister is most relevant and coded accordingly (for a different choice, see Rasmussen 2007, p. 8). However, this question mainly matters for coalition governments, where the head of government and the minister may come from different parties.

To code “ideological distance”, we assumed that the left-right dimension is (still) the most important reference for party competition, and that partisan effects should be measured accordingly (Mair 2007). While there is no shortage of data on party policy preferences, we used the expert survey designed by Benoit and Laver (2006). Even if our indicator of distance is relatively crude, and even if additional policy dimensions beside left-right might also “matter”, it still provides us with useful information: comparing EAs with “standard” legislation, we find considerable variation in ideological distance.

Table 8: Ideological Distance and Early Agreements

	No early agreement	Early agreement	P-value
Distance	4.54	3.88	0.00

As Table 8 shows, the distance between the chief negotiators is on average 3.88—on a 20 point-scale—in the case of EA, while the average distance is 4.54 for other files. The last column in the table reports the result of a difference-of-means test, indicating that the difference between EAs and non-EAs on this variable is statistically significant—that is, we need to reject the hypothesis that the difference between the ideological distance-scores is insignificant ($p < 0.01$). Hence, ideological preferences may matter for decision-makers’ choice to “go informal”, and the role of political parties in this context is worth investigating.

Workload

Finally, our data set includes the variable “workload”, measured as the number of codecision procedures under discussion during the term of the Presidency that concludes the negotiations. Our measure of workload differs from the one used by Rasmussen (2011, p. 52), who measures this variable “by counting the number of pending legislative files within the presidency when the first reading took place”.

We expect that a high number of legislative dossiers on the table—increasing the costs stemming from a heavy legislative agenda and from information gathering—creates strong incentives for negotiators to “go informal” (see Reh et al. 2013, pp. 1123-1124). Indeed, as Table 9 shows, EAs are more frequent when the workload is high: EAs are concluded when Presidencies deal with, on average, 51 dossiers, while other procedures are concluded when Presidencies have, on average, 47 legislative files on their agenda. The p-value (0.00) indicates that the difference between EAs and non-EAs on the variable workload is statistically highly significant.

Table 9: Workload and Early Agreements

	No early agreement	Early agreement	P-value
Workload	47.4	50.8	0.00

In sum, our data set systematically coded legislative files in the Fifth and Sixth EP according to legal nature, policy area, complexity, media salience, (re)distributive consequences and duration, and allowed us to explore variation in the use of EAs across these dimensions. Researchers interested in the role of the Presidency, the impact of partisan ideology or the functional pressures of workload will find legislation coded according to those respective variables, while scholars interested in the effect of the above factors in a multivariate regression can turn to the results of our earlier analysis (Reh et al. 2013, pp. 1130-1135).

5. Conclusion

This working paper introduced our new data set on “The Informal Politics of Codecision” from 1999-2009. We presented the variables included in the data set, justified how these variables were operationalised and measured, and explained how the data were collected and coded. Our methodological choices were embedded in a wider discussion of how the steep rise in EAs transformed EU legislation since 1999; we argued that the routine use of informal politics has not only transformed the practice of codecision but also impacts on the theorisation, analysis and evaluation of legislative decision-making in the EU.

The wide range of descriptive statistics presented here on the frequency, scope and characteristics of EAs underlines strongly that the informalisation and seclusion of codecision is highly relevant for both scholars and decision-makers. Not only has early conclusion increased sharply since 1999 (see Table 2), so has the percentage of the more restricted and contested sub-set of early agreements (see Figures 2, 3 and 4). Furthermore, our data clearly show that informal decision-making is not restricted to technical, urgent or uncontested files: EAs can be found among both salient and non-salient dossiers (see Table 4) as well as among redistributive files (see Table 5); EAs increase across the board with the time codecision has been in use and, in particular, following the EU’s 2004 enlargement (see Figures 2 and 3); and informal politics is linked to the ideological proximity of the main negotiators (Table 8). These results—in particular when read in combination with our earlier multivariate analysis (Reh et al. 2013)—confirm that EAs matter: they pose a qualitative, as well as a quantitative, challenge to the transparency of co-legislation in the EU, and they do so across the breadth of legislative dossiers under consideration.

By launching our data set, we aim to inform the nascent debate on the study of informal governance and institutions at the domestic, supranational and global level; to draw attention to the methodological challenges of studying informal decision-making, and to offer some solutions for these challenges; to provide EU scholars with a rich source of data to complement existing large-n and in-depth case studies on the process and outcome of trilogue negotiations; and to see our data used in studies of legislative politics and legislative behaviour in the European Union and beyond.

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